IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELALTE SIDE

SECOND APPEAL NO.651 OF 2005
WITH
CIVIL APPLICATION NO.1115 OF 2005
AND
WRIT PETITION NO.4939 OF 2005

Mr.Iqbal Hussein Sheikh. ...Appellant.
Vs.
Mr. Adul Hafiz Pacho. ...Respondent.

....

Mr. Y. S. Jahagirdar with Mr. G.S.Godbole for the Appellant.
Mr. S.G. Kudle for the Respondent.

.....

CORAM : DR. D.Y. CHANDRACHUD, J.

December 9, 2005.

P.C.:

The Respondent to the Second Appeal instituted a suit for possession which came to be decreed and the decree has been confirmed in appeal. The Appellant in the Second Appeal had also instituted a declaratory suit seeking a declaration that he is a tenant in respect of the premises. That declaratory suit was dismissed and the dismissal was confirmed in appeal. The companion Writ Petition filed by the Appellant to the Second

Appeal has also been placed for hearing before this Court in pursuance of the directions of the Hon'ble the Chief Justice.

2. The dispute between the parties entirely turns upon the construction of an agreement dated 10th July 1997 that was arrived at between the parties and after which there was a renewal. Though the agreement is styled as an agreement for tenancy and uses the word 'rent' in describing the payment of compensation, that by itself is not conclusive in view of the decision of the Supreme Court in **Associated Hotels of India Ltd. vs. R.N. Kapoor**, AIR 1959 SC 1262. The real intention of the parties must be construed, having regard to the material provisions of the agreement. There are in my view certain specific provisions of the agreement which clearly demonstrate that the real intention of the parties is not to create a tenancy but only a licence: (i) The subject matter of the agreement is a Tea Stall that was hitherto conducted by the original plaintiff. The agreement recites that the defendant was handed over for his use the hotel together with articles, furniture and fixtures including the equipment and utensils of the hotel conducted therein. The Defendant was to hand back the Hotel as well as the articles upon the expiry of the term of the

agreement; (ii) The municipal taxes, maintenance charges and licence renewal fees, would have to be paid by the Plaintiff who was the owner of the stall. The business was thus carried on in the name of the Plaintiff and the Plaintiff retained dominion in respect thereof; (iii) Together with the agreement, a deposit of Rs.1 lakh was paid over by the Defendant to the Plaintiff. The agreement was entered into at a time when the Bombay Rent Act, which was in force, prohibited the acceptance of any deposit in connection with the creation of tenancy. The parties, therefore, cannot be attributed with an intention to execute an agreement of tenancy that would invite penal sanctions relatable to the acceptance of a deposit contrary to law. Those penal sanctions would not be attracted in the case of a licence agreement; (iv) Though the term of the agreement was to be three years parties provided that the agreement would come up for renewal, upon the expiry of each period of 11 months. In view of these circumstances, the reasoning which has been adopted by the Courts below in two separate suits, namely, the Plaintiff's suit for possession and in the Defendant's suit for a declaration of tenancy, on a construction of the document is proper. The view is more than just a possible view and is a correct view to take. Undoubtedly, as laid down by

the Supreme Court in **Roop Kumar vs. Mohan Thedadi**, AIR 2003 SC 2418, Section 91 of the Evidence Act prohibits the proof of contents in writing otherwise than by the writing itself. In this case the document in question, is however, admitted and the construction which is placed thereon by the Courts below does not suffer from any error. Both the appeal and petition shall accordingly stand rejected. However, in order to enable the Appellant/Petitioner to seek his remedies in appeal, there shall be a direction to the effect that the Appellant shall not be dispossessed for a period of eight weeks from today subject to the filing of the usual undertaking before this Court including in respect of the payment of the arrears of rent.

3. In view of the disposal of the appeal, the Civil Application does not survive and is accordingly disposed of.

....